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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO GARCIA CONTRERAS, Defendant and Appellant.	G039946 (Super. Ct. No. 07HF1383) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified. Remanded for resentencing.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Garrett Beaumont and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Roberto Garcia Contreras was convicted of, among other things, attempted burglary. The trial court sentenced defendant as if the jury had found him guilty of first degree attempted burglary. Because the jury's verdict did not contain a finding that defendant committed attempted *first degree* burglary, or that he had attempted to commit residential burglary or burglary of an inhabited dwelling, Penal Code section 1157 requires the judgment to be modified to reflect a conviction for attempted second degree burglary.

Defendant also argues, and the Attorney General agrees, that defendant's sentence must be modified to delete reference to the attempted burglary conviction as a violent felony. Attempted burglary is not a violent felony under Penal Code section 667.5, subdivision (c), and we therefore grant defendant the relief sought.

We therefore direct the judgment to be so modified and remand for resentencing. As modified, we affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 22, 2007, Jack Nethercutt was housesitting at a residence on East Oceanfront in Newport Beach. At approximately 2:00 a.m., Nethercutt was awakened from his sleep by a sound at the window. He looked up and saw a hand trying to push open the window above his head. Nethercutt got up and saw the silhouette of a person standing on the patio. The person looked in Nethercutt's direction and ran away. Nethercutt went outside and saw three or four people at the far end of the alley, and then called the police. Defendant's fingerprint was later lifted from the window.

Shortly thereafter, at a residence approximately one-half mile away on East Ocean Boulevard, Moya Monroe heard loud noises outside her bedroom door. She got out of bed and saw an unknown person inside her home. The person ran out the back door, into the alley, and drove away in a white sport utility vehicle. Monroe saw five

people in the vehicle. She discovered her cordless telephone, a computer monitor, and a keyboard were missing.

Newport Beach police officers soon located a white sport utility vehicle parked in a residential driveway approximately one-half mile from the Monroe residence. Five people, including defendant, were ordered out of the vehicle. The personal property taken from the Monroe residence was found in the rear seat of the vehicle. The police officers discovered a digital scale in the glove compartment; another digital scale and four empty Ziploc baggies in the driver's side door; three Ziploc baggies containing a white, crystalline substance inside an open beer bottle on the floorboard behind the center console; and a glass pipe with burnt residue, used for smoking methamphetamine, on the passenger floorboard behind the front passenger seat. The substance inside one of the Ziploc baggies was analyzed, and determined to be 1.41 grams of methamphetamine.

Following a jury trial, defendant was convicted of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a) [count 1]); attempted burglary (*id.*, §§ 664, 459, 460, subd. (a) [count 2]); possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a) [count 4]); and receiving stolen property (Pen. Code, § 496, subd. (a) [count 5]).[1] The jury found that nonaccomplices had been present during the commission of the burglary and the attempted burglary, pursuant to Penal Code section 667.5, subdivision (c)(21), making those crimes violent felonies.

The trial court sentenced defendant to a total term of seven years four months, consisting of the upper term of six years on count 1, and consecutive terms of eight months each on counts 2 and 4. The court dismissed count 5 pursuant to Penal Code section 1385 in the interests of justice. Defendant timely appealed.

[1] The jury found defendant not guilty of transporting a controlled substance. (Health & Saf. Code, § 11379, subd. (a).)

DISCUSSION

I.

DEFENDANT'S CONVICTION FOR ATTEMPTED FIRST DEGREE BURGLARY MUST BE REDUCED TO ATTEMPTED SECOND DEGREE BURGLARY.

"Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury . . . must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury . . . to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree." (Pen. Code, § 1157.) In addition to a specific finding that a burglary or attempted burglary was of the first degree, Penal Code section 1157 can be complied with if the verdict includes a finding that is equivalent to a finding the crime committed was of the first degree. For instance, in *People v. Atkins* (1989) 210 Cal.App.3d 47, 52, the jury's finding on the verdict forms that the defendant was guilty of "'residential burglary' or 'burglary . . . upon an inhabited building and a residence'" was the same as a finding that the defendant was guilty of first degree burglary.

Similarly, in *People v. Anaya* (1986) 179 Cal.App.3d 828, 831, although the jury did not find the defendant had committed first degree burglary, it did find "'the Burglary was committed upon an inhabited building and a residence.'" By using the same language found in Penal Code section 460, subdivision (a), which defines first degree burglary, the verdict complied with section 1157. (*People v. Anaya*, *supra*, at pp. 831-832.) And, in *People v. Goodwin* (1988) 202 Cal.App.3d 940, 946, the jury's verdict stated it found the defendant guilty of "'residential burglary.'" The appellate court concluded the verdict met the requirement of section 1157: "There is no logical reason to compel the fact finder to articulate a numerical degree when, by definition, 'first degree burglary' and 'residential burglary' are one and the same thing." (*People v. Goodwin*, *supra*, at p. 947.)

The verdict form on attempted burglary in this case reads, in its entirety, as follows: "We the Jury in the above-entitled action find the Defendant, ROBERTO CONTRERAS, GUILTY of a violation of Section 664-459-460(a) of the PENAL Code of the State of California (ATTEMPT – BURGLARY) as charged in COUNT 2 of the Information. [¶] VICTIM: JACK NETHERCUTT." The verdict form does not include a finding that the attempted burglary was of the first degree, or of a residence or inhabited dwelling. It therefore fails to comply with Penal Code section 1157.

The Attorney General, however, argues the reference to Penal Code section 460, subdivision (a), and the reference to count 2 of the information, which charged defendant with attempted first degree burglary, suffice. We disagree. The Attorney General cites only one case in support of his argument. In *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1247-1248, another panel of this court rejected the defendant's argument that the first degree burglary charge against him must be reduced to second degree because the verdict did not include a specific finding that the burglary was of the first degree. That panel concluded, in part, that the reference in the verdict form to the information, which charged the defendant with "'RESIDENTIAL BURGLARY—1st Degree,'" was sufficient under section 1157. (*People v. Preciado*, *supra*, at p. 1247, italics omitted.) The panel also relied on the verdict's finding that the defendant was guilty of "'RESIDENTIAL BURGLARY,'" so any reliance on the language of the information was unnecessary to the court's opinion. (*Id.* at pp. 1247-1248.) The Attorney General cites us to no case, and we have found none, in which the appellate courts have concluded *only* a general reference in the verdict form to the charging document without any reference to first degree burglary or residential burglary is sufficient to constitute a first degree finding under section 1157.

Given the lack of a finding of attempted first degree burglary by the jury—or equivalent language satisfying the requirements of attempted first degree burglary as explained above—defendant can only be guilty of attempted second degree burglary on

count 2. Defendant's sentence on count 2 was based on an assumption that defendant was guilty of attempted first degree burglary, which carries a sentence of one, two, or three years. (Pen. Code, §§ 461, subd. 1, 664, subd. (a).) Attempted second degree burglary, however, carries a maximum sentence of six months in prison or county jail. (*Id.*, §§ 461, subd. 2, 664, subds. (a), (b).) We modify the judgment to reflect a conviction for attempted second degree burglary, rather than attempted first degree burglary, and remand for resentencing.[2]

II.

THE JUDGMENT MUST BE MODIFIED TO REFLECT DEFENDANT'S CONVICTION FOR ATTEMPTED BURGLARY IS NOT A VIOLENT FELONY.

Defendant argues, and the Attorney General agrees, that attempted burglary is not a violent felony under Penal Code section 667.5, subdivision (c). The jury's finding that a nonaccomplice was present when the attempted burglary was committed must be stricken and the judgment modified. (See *People v. Ibarra* (1982) 134 Cal.App.3d 413, 424-425.)

DISPOSITION

The judgment is modified to reflect (1) on count 2, defendant was convicted of attempted second degree burglary, and (2) defendant's conviction for attempted burglary is not a violent felony. As so modified, the judgment is affirmed, and the matter is remanded for resentencing. The trial court is directed to prepare an

[2] At oral argument, the Attorney General asserted a new theory regarding the inapplicability of Penal Code section 1157. We are not required to consider arguments made for the first time at oral argument. (*People v. Pena* (2004) 32 Cal.4th 389, 403; *People v. Mateljan* (2005) 129 Cal.App.4th 367, 376, fn. 4.) We reject the Attorney General's attempt to present a new argument for the first time at oral argument.

amended abstract of judgment and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.